



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 129 OF 2014

THOMAS SHIKANZAYA SHIKHOBIA.....PLAINTIFF

VERSUS

SETH ODERA

PETER IMBISI

JOSEPH WANGA SHIKITOBA

GOLDMERE PROPERTIES LIMITED.....DEFENDANTS

JUDGEMENT

By a plaint dated 19th April 2014, the plaintiff avers that he is one of the sons to the late Shikhoba. The plaintiff further avers that their father left behind 22 acres of land to be shared amongst three of his sons namely Joseph Shokhoba, Gabriel Shikhoba and the plaintiff. The parcel of land was known as BUTSOTSO/INDANGALASIA/957. The plaintiff avers that the 3rd defendant was registered as proprietor of land parcel No. BUTSOTSO/INDANGALASIA/957 to hold in trust for the plaintiff and Gabriel Shikhoba who is their other brother. The plaintiff avers that the 3rd defendant did demarcate the parcel of land BUTSOTSO/INDANGALASIA/957 into 3 portions causing official sub division of the parcels into BUTSOTSO/INDANGALASIA/1207, 1208 and 1209. The plaintiff avers that the 3rd defendant retained ownership of 1207 and 1208 as he was away when the subdivision was done. The plaintiff avers that his two brothers including the defendant were given land parcels 1207 and 1209 and he was entitled to 1208. The plaintiff avers that in 2005 when he came back home and while he was working on land parcel No. 1208 he was confronted by the 2nd defendant and asked to stop working the land as the land was his. The plaintiff avers that he did not relinquish his interest in the suit land to any of the defendants herein. The plaintiff avers that upon realizing the change in ownership he lodged a case against the 2nd defendant at the land dispute tribunal and its findings were adopted vide Misc. Civil award No. 33 of 2008. The plaintiff avers that the 2nd defendant was ordered to cause the transfer of the suit land into his name and that there is a duly signed transfer by the executive officer transferring land parcel No. 1208 into his name. The plaintiff avers that the 1st defendant had no legal capacity to transfer and/or sell the suit land to the 4th defendant. The plaintiff without prejudice to the foregoing and in the alternative avers that there was no agreement of sale between the 1st and 2nd defendants father for sale of land parcel NO. BUTSOTSO/INDANGALASIA/1208. The plaintiff avers that the civil suit No. SRMCC 59 of 1981 did not award land parcel No. BUTSOTSO/INDANGALASIA/1208 to the father of the 1st and 2nd defendants. The plaintiff further avers that the award adopted by the court in SRMCC NO. 59 of 1981 referred to land parcel NO. BUTSOTSO/INDANGALASIA/959. The plaintiff avers that the judgment in Kakamega SRMCC NO. 59 of 1981 did not order the subdivision of land parcel NO. BUTSOTSO/INDANGALASIA/957. The plaintiff further avers that the said judgment is bad in law as it was made in express contravention of the Land Control Act, Sec 6 as consent had not been obtained within 3 months or six months and no title could pass to the father of the 1st and 2nd defendants. PW2 the plaintiff's brother corroborated the plaintiff's evidence and confirms that the latter lives in the Rift Valley. PW3, the village elder and a member of Lurambi District Tribunal in 2004 and they decided the suit land belonged to the plaintiff.

That 1st defendant Seth Odera Imbisi, testified that he acquired land parcel LR Butsotso/Indangalasia/1208 on transmission from his late mother, who had acquired it also on transmission from her late husband vide Kakamega High court succession cases No. 711 of 2009 and 59 of 1981 respectively. The 1st defendant avers that the orders in the aforesaid cases were never challenged, set aside to-date. The 1st defendant avers that the plaintiff's claim and enforcement of the purported order of 2009 is statutory time barred. The 1st defendant avers that no party ever held in trust land parcel L.R. Butsotso/Indangalasia/1208 or 957 on behalf of the plaintiff as alleged. The 1st and 2nd defendant obtained the subject matter on transmission from their late mother, who had also obtained it on transmission from her late husband. The plaintiff has never occupied and or used the subject matter. The plaintiff or 3rd defendant never challenged the proceedings and orders in the previous suits. The plaintiff's father never owned the property. The ownership of Joram Imbisi Ingulu of the subject matter has never been challenged. The 1st defendant has no interest in the subject matter having transferred the same to the 4th defendant. DW2, the 2nd defendant's statement was adopted in court as evidence.

The 3rd defendant avers that it is the father of the 1st and 2nd defendants who caused the subdivision of land parcel NO. BUTSOTSO/INDANGALASIA/957 into 3 portions. The 3rd defendant avers that he did not sell any part of BUTSOTSO/INDANGALASIA/957 to the father of the 1st and 2nd defendants and further that he did not transfer land parcel NO. BUTSOTSO/INDANGALASIA/1208 to the 1st and 2nd defendants' father. The 3rd defendant avers that he did not attend any Land Control Board with the 1st and 2nd defendants' father over land parcel No. BUTSOTSO/INDANGALASIA/1208 or 957. The 3rd defendant avers that the change of land parcel No. BUTSOTSO/INDANGALASIA/957 into 1207, 1208 and 1209 was done without legal basis as the ruling adopted in CMCC NO. 59 of 1981 referred to land parcel NO. BUTSOTSO/INDANGALASIA/959 and not 957. The 3rd defendant avers that land parcel NO. BUTSOTSO/INDANGALASIA/1208 was fraudulently transferred into the name of the 1st and 2nd defendants' father. The 3rd defendant prays for a declaration that the 1st & 2nd defendants' father fraudulently obtained registration of land parcel No. BUTSOTSO/INDANGALASIA/1208 into his name. The 3rd defendant further seeks a declaration that the 1st & 2nd defendants' father had no good title to pass to his heirs and by extension the 1st defendant had no good title to pass to 4th defendant.

The 4th defendant admits being the registered owner of land parcel No. Butsotso/Indangalasia/1208. The 4th defendant avers that the plaintiff has never been registered as the proprietor of land known as Butsotso/Indangalasia/957 or any portion hived thereof. The 4th defendant avers that, at the time of subdivisions of land parcel No. Butsotso/Indangalasia/957, the then registered owner had full authority to subdivide the land and deal thereof as he wished with the land. The 4th defendant avers that the plaintiff's feelings of entitlement to land parcel No. Butsotso/Indangalasia/1208 are misplaced and since the law is clear as to various mode title acquisitions over land. Further, at the time the plaintiff was lodging the alleged case against the 2nd defendant at the land dispute tribunal, the land was registered in the name of Gladys Amboga Imbisi and not the 2nd defendant. The said proceeding at the land dispute tribunal were illegal, erroneous and offended the rules of natural justice since the registered owner of the land at the time was never involved and thus the subsequent filing and adoption of the final findings of the tribunal by the magistrate court is founded on an illegality and thus void ab initio. The land dispute Tribunal did not have jurisdiction to interfere with registered land and ownership thereof and therefore the resident magistrate order adopting the same was illegal and void. The 4th defendant avers that at the time it was purchasing the suit property, it conducted due diligence and established that Mr. Jorum Imbisi purchased the Land title No. Butsotso/Indangalasia/1208 for value.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is a finding of fact the suit land parcel No. Butsotso/Indangalasia/1208 is registered in the name of the 4th Defendant. The issue to be determined by this court is whether or not they hold a good title. I have perused the documents presented as evidence before this court. The 3rd defendant was the first registered as proprietor of land parcel No. BUTSOTSO/INDANGALASIA/957 way back in 1981 (PEX1). The 3rd defendant did demarcate the parcel of land BUTSOTSO/INDANGALASIA/957 into 3 portions causing official sub division of the parcels into BUTSOTSO/INDANGALASIA/1207, 1208 and 1209 in 1986 (PEX1). Subsequently, land parcel No. BUTSOTSO/INDANGALASIA/1208 was transferred into the name of the 1st and 2nd defendants' father Jorum Ingulu Imbisi through a court order in case number CMCC NO. 59 of 1981 (PEX 4 and 5). PEX 3 is the green card confirming the same. After the demise of Jorum Ingulu Imbisi the late Gladys Amboga inherited her husband's land the suit property title No. Butsotso/Indangalasia/1208 through Kakamega Succession Cause No. 274/1988. I find that the late Gladys occupied and cultivated the suit property until her demise. That the plaintiff never challenged/objected to the late Gladys Amboga title to the suit property title No. Butsotso/Indangalasia/1208 since she inherited the said Land from her late husband Mr. Jorum Imbisi pursuant to Kakamega Succession Cause No. 274/1988. The plaintiff avers that upon realizing the change in ownership he lodged a case against the 2nd defendant at the land dispute tribunal and its findings were adopted vide Misc. Civil

award No. 33 of 2008. The plaintiff avers that the 2nd defendant was ordered to cause the transfer of the suit land into his name and that there is a duly signed transfer by the executive officer transferring land parcel No. 1208 into his name. I find that this order was a nullity as there existed an earlier order CMCC NO. 59 of 1981 in which the plaintiff failed to pursue and set aside. The matter was sub judice and res judicata. After the demise of Gladys Amboga the plaintiff did not object to the confirmation of grant in the succession cause No. 711/2009 whereby the court confirmed the 1st and 2nd defendants as the sole beneficiaries of title No. Butso/Indangalasia/1208. I find that in both Succession Cause No. 274/1988 and Succession Cause No. 711/2009 the plaintiff was not named as a beneficiary of the estate of Jorum Imbisi and Gladys Amboga Imbisi respectively who were the then registered owners of the title No. Butso/Indangalasia/1208. The 1st defendant then sold the suit land to the 4th defendant. I find that the 4th defendant is a bonafide purchaser for value. I find that the 1st & 2nd defendants had good title to pass to the 4th defendant as they had inherited the same from their mother the late Gladys Amboga Imbisi. On her part Gladys Amboga Imbisi had inherited the suit land from the estate of her husband Jorum Ingulu Imbisi. Jorum Ingulu Imbisi acquired the title through a court order in CMCC NO. 59 of 1981 and the same was never challenged and still stands. I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss it. The 3rd defendant has also failed to establish his counterclaim on a balance of probabilities and I dismiss it. There will be no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE